No. 08-1238

In the Supreme Court of the United States

YURI J. STOYANOV, PETITIONER

v.

RAY MABUS, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in affirming the district court's dismissal of petitioner's employment discrimination and retaliation claims, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" under Rule 10(a) of this Court's rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulation and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the *Federal Reporter* but is reprinted in 305 Fed. Appx. 945. The orders of the district court granting summary judgment in favor of respondents (Pet. App. A5-A13) and denying reconsideration (Pet. App. A4-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2009. The petition for a writ of certiorari was filed on April 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the former Soviet Union in 1955 and became an American citizen in 1984. Since

1987, petitioner has been employed by the Department of the Navy as a scientist at the Naval Surface Warfare Center, Carderock Division in Maryland. Pet. App. A7. Beginning in 2002, petitioner has filed a series of pro se lawsuits against the Secretary of the Navy and other Navy officials alleging a variety of forms of employment discrimination. *Id.* at A8-A9.

In his first suit, petitioner, along with his twin brother (also then employed by the Navy), alleged that the Navy had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, and the Whistleblower Protection Act, 5 U.S.C. 1214 *et seq.* Specifically, petitioner and his brother contended that they were denied promotions and subjected to other forms of employment discrimination on the basis of their national origin, their age, and as retaliation for engaging in protected activities. Pet. App. A8-A9. After exhausting their administrative remedies, petitioner and his brother pursued the discrimination and retaliation claims in federal district court and sought relief on the whistleblower claims before the Merit Systems Protection Board (MSPB).

In July 2006, the district court granted partial summary judgment for the defendants on the employment discrimination claims. See *Stoyanov* v. *Winter*, No. 05-1567, 2006 WL 5838450 (D. Md. July 25, 2006). After discovery, the court granted complete summary judgment for the defendants and dismissed petitioner's (and his brother's) claims. See *Stoyanov* v. *Winter*, No. 05-1567, 2007 WL 2359771 (D. Md. Aug. 15, 2007). Those decisions were later affirmed by the Fourth Circuit, and plenary review was denied by this Court. See

Stoyanov v. *Winter*, 266 Fed. Appx. 294 (4th Cir.) (per curiam), cert. denied, 129 S. Ct. 258 (2008).

With respect to petitioner's whistleblower claims, the MSPB dismissed those claims for lack of jurisdiction. The Federal Circuit affirmed that decision, and plenary review was denied by this Court. See *Stoyanov* v. *MSPB*, 218 Fed. Appx. 988, 989 (Fed. Cir.) (per curiam), cert. denied, 128 S. Ct. 247 (2007).[1]

2. This case involves the second of petitioner's seven employment discrimination complaints.[2] Like in his first lawsuit, petitioner claims, *inter alia*, that he was subjected to unlawful discrimination on the basis of his national origin and age and that he was retaliated against for his previous complaints. Specifically, petitioner contends that he was discriminated against by the Navy when it refused to promote him to various positions, failed to provide him with reassignments that would have offered better opportunities for promotion, and deprived him of leave. Pet. App. A8-A10. Respondents filed a motion to dismiss or, in the alternative, for summary judgment.

3. On August 11, 2008, the district court granted summary judgment in favor of respondents and dismissed petitioner's complaint. The district court began by noting that, "because [petitioner] has pyramided his claims and filed judicial actions *seriatim* while incorporating earlier allegations into later complaints, the prior

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[1] The Federal Circuit also affirmed the dismissal of petitioner's brother's whistleblower claims. See *Stoyanov* v. *Department of the Navy*, 474 F.3d 1377 (Fed. Cir.), cert. denied, 128 S. Ct. 247 (2007).

[2] The district court has entered orders limiting "plaintiff and his brother to one active case at a time." Pet. App. A9 n.1. The complaint at issue here "relates to events and alleged adverse employment actions occurring between Spring 2002 and Winter 2002." *Id.* at A8.

adjudications of [petitioner]'s claims necessarily narrow the scope of subsequent claims." Pet. App. A7. The court observed that, based on the opinions and orders from petitioner's earlier case, there was "very little" left to be "adjudicated here." *Id.* at A9.

For those remaining cognizable claims, the district court held that petitioner failed "to demonstrate his employment discrimination claims through direct evidence." Pet. App. A11. Accordingly, the court applied the "familiar burden-shifting framework" of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). As for the first step in that analysis, the court determined that petitioner had not established a *prima facie* case of discrimination. Specifically, the court found that there was "no basis in the record from which the court could infer that unlawful discrimination played a role in [respondents'] selection processes."[3] Pet. App. A12. The court addressed each of petitioner's claims of discrimination, see *id.* at A9-A11 & nn.2-3, and concluded that petitioner had "not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion," *id.* at A12. Rather, the court observed, petitioner's "arguments [were] based on his own conspiratorial theories and conclusory leaps in reasoning." *Ibid.*

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[3] The court held that in order to establish a prima facie case of discrimination for failure to promote, petitioner had to demonstrate that (1) he is a member of a protected class; (2) his employer had an open position for which he applied or sought to apply; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Pet. App. A11-A12 (citing *Evans* v. *Technologies Applications & Serv. Co.*, 80 F.3d 954, 959-960 (4th Cir. 1996)). The court found that petitioner satisfied the first two prongs and assumed, *arguendo*, that he demonstrated the third. *Id.* at A12.

The court further held that, "even assuming that [petitioner] had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations [respondents] have offered for their appointments." Pet. App. A12. Consequently, the court held that under the *McDonnell Douglas* framework, "[n]o reasonable factfinder could return a verdict in favor of [petitioner] on this record." *Id.* at A13.

4. The court of appeals affirmed in a brief, unpublished, per curiam opinion. The court stated that "[w]e have reviewed the record and find no reversible error." Pet. App. A4.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of that fact-bound ruling is not warranted.

1. As an initial matter, petitioner argues that this Court should grant the petition for a writ of certiorari in order to exercise its "supervisory power." See, *e.g.*, Pet. i; Pet. 13 (requesting "an exercise of this Court's supervisory power to restore justice and vacate the appeals court decision"); Pet. 15 (same). That contention lacks merit.

Pursuant to Rule 10(a) of this Court's rules, this Court may grant a petition for a writ of certiorari to determine whether "the Court of Appeals ha[s] 'so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.'" *Nguyen* v. *United States*, 539 U.S. 69, 74 (2003). This Court has traditionally exercised its supervisory powers to correct errors involving "the proper administration of judicial business." *Id.* at 81

(quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.)). The Court thus invokes its supervisory powers "to prescribe the method by which [lower courts] go about deciding the cases before them." *Id.* at 81 n.13 (quoting *Lehman Brothers* v. *Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring)); see *McCarthy* v. *United States*, 394 U.S. 459, 463-464 (1969).

Petitioner's claims of error are plainly not of that sort. Petitioner has not pointed to any defect in the procedures employed by the district court or the court of appeals in considering his case. Rather, petitioner merely argues that the lower courts erred in a routine application of federal law to the particular facts of this case. Accordingly, an exercise of this Court's supervisory powers is not warranted.

2. Petitioner renews his contention (Pet. 6-15) that the district court erred in granting summary judgment for respondents. Notably, petitioner does not claim that the court relied on an erroneous legal standard but rather that it erred in its assessment of petitioner's evidence. See, *e.g.*, Pet. 6 (asserting that "[p]etitioner presented ample evidence to defeat [respondents'] motion for summary judgment"). The district court correctly granted summary judgment for respondents, and that fact-bound ruling does not warrant this Court's review.

Despite petitioner's claims to the contrary, the district court correctly held that petitioner did not present any direct evidence of discrimination or retaliation. Pet. App. A11. In his petition, much like in his filings before the lower courts, petitioner relies primarily on unsubstantiated and conclusory allegations. See, *e.g.*, Pet. 10 (alleging a "series of secret promotions of younger employees with inferior qualifications than [petitioner] under the pretext of 'accretion of duties' in an effort to

conceal a promotion opportunity from [p]etitioner"); see Pet. App. A12 (finding that petitioner's "arguments [were] based on his own conspiratorial theories and conclusory leaps in reasoning rather than evidence"). Such assertions cannot defeat a properly supported motion for summary judgment. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325-326 (1986).

To the extent petitioner points to more specific evidence, his claims are equally unavailing. For example, petitioner contends (Pet. 9-10) that a March 2000 email sent by one of petitioner's superiors to a number of individuals, including petitioner's brother, is "direct evidence of the selecting official's discriminatory attitude based on [p]etitioner's age." Pet. 9. However, petitioner relied on that very same email message in his first lawsuit, where he also claimed that the email was direct evidence of age discrimination. The district court in that case, after considering that email message in its proper context, held that the email "does not constitute direct evidence of discrimination." *Stoyanov* v. *Winter*, No. 05-1567, 2006 WL 5838450, at *10 (D. Md. July 25, 2006). That decision was later affirmed by the Fourth Circuit. *Stoyanov* v. *Winter*, 266 Fed. Appx. 294 (4th Cir.) (per curiam), cert. denied, 129 S. Ct. 258 (2008). As a result, petitioner is precluded from arguing that the email is direct evidence of discrimination a second time around. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983) ("[W]hen a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which

might have been offered for that purpose.'") (quoting *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876)).[4]

Petitioner also asserts (Pet. 14) that a September 2002 email message, in which respondent Gary Jebsen stated that it was time "to crack down" on petitioner and his brother, constituted "direct evidence of [respondents'] intent to escalate retaliations." Petitioner fails to note, however, that the supposed "crack down" mentioned in that message concerned petitioner's excessive use of official government time and resources to work on his multitude of Equal Employment Opportunity (EEO) complaints. In accordance with 29 C.F.R. 1614.605(b), the Navy afforded petitioner official time to pursue his EEO complaints against the agency. However, the Navy found that petitioner was abusing that right by working on such matters for an excessive number of hours. The alleged "crack down" was merely the Navy's effort to enforce reasonable restrictions on petitioner's use of official government time. Specifically, the Navy decided to limit the official time petitioner could spend

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[4] In any event, the email message does not present direct evidence of discrimination when considered in its proper context. The remarks about the "need for fresh ideas and enthusiastic energy of new employees" were made in the context of a discussion about the number of current employees over the age of 55 and the projected increase in the number of such employees over the next several years. The email expressed concern over the possibility of losing many experienced workers because of retirement and attrition. Based on those concerns, the email stated that "we need to keep new employees coming in to overcome the loss of experience." *Stoyanov*, 2006 WL 5838450, at *10. The district court first presented with this email correctly concluded that it "create[d] no inference of age bias" and "reflect[ed] no more than a fact of life and as such is merely a 'truism[]' that carries with it no disparaging undertones." *Ibid.* (quoting *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994)).

on his EEO complaints to between two and four hours per week. In March 2003, the Equal Employment Opportunity Commission largely sustained those restrictions as reasonable under Section 1614.605(b). See Gov't Reply Mem. in Support of Mot. to Dismiss or, in the Alternative, for Summary Judgment, Exh. 5.

In any event, like with the other email message discussed above (and, for that matter, most of petitioner's assertions), petitioner is precluded from relying on this argument because it was raised and rejected in his initial lawsuit. In his first district court complaint, petitioner alleged that the September 2002 email message was evidence of intentional discrimination and retaliation. See Compl. ¶ 74, *Stoyanov* v. *Winter*, *supra* (No. 05-1567 (Aug. 15, 2007)). As noted above, the district court found against petitioner on those claims in a decision that was affirmed on appeal. See *Stoyanov*, 2007 WL 2359771, at *1. As a result, petitioner is barred from simply repeating the same allegations here. Indeed, as the district court in this case correctly recognized, "the prior adjudications of plaintiff's claims necessarily * * * leave[] very little to be adjudicated here." Pet. App. A7-A9.

After finding no direct evidence of discrimination or retaliation, the district court correctly applied the *McDonnell Douglas* burden-shifting framework. The court first determined that petitioner did not satisfy the first step in that analysis because he could not establish a *prima facie* case. The court held that petitioner had "not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion." Pet. App. A12. Nothing in petitioner's petition casts doubt on that factual assessment.

The district court also held that, "even assuming that [petitioner] had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations [respondents] have offered for their appointments." Pet. App. A12. Petitioner has failed to provide any credible evidence to the contrary.[5]

In sum, the district court correctly determined that petitioner failed to present any direct evidence of discrimination or retaliation, that petitioner could not establish a *prima facie* case under either theory, and that, even assuming petitioner could make a *prima facie* showing, he could not rebut respondents' legitimate, non-discriminatory explanations for their decisions. Because petitioner points to no evidence that would undermine those conclusions, further review of those fact-bound rulings is not warranted.[6]

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[5] The Court's expected decision in *Gross* v. *FBL Fin. Servs., Inc.*, No. 08-441 (argued Mar. 31, 2009), has no bearing on this case. The question presented in *Gross* is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a discrimination case under the Age Discrimination in Employment Act. That issue is not implicated here. To begin, petitioner does not assert that this is a mixed-motive case. Furthermore, the district court held that petitioner failed to "produce[] any meaningful evidence"—direct, circumstantial, or otherwise—"to suggest that his age" was a "factor[] in his inability to secure a promotion." Pet. App. A12. Because the court found that there was *no* evidence that petitioner's age was a factor in the Navy's decision-making, any sort of mixed-motive analysis would be inapposite.

[6] Petitioner also contends (Pet. 6-15) that the court of appeals and district court "departed from the accepted decisions" of the Fourth Circuit. Even if that assertion were correct—and it is not—, any such intra-circuit conflict does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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